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ALEXANDER L. STEVAS,
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IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH S. IVERY,
Petitioner

-vs-

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE QUESTION PRESENTED FOR REVIEW

WHETHER A DECISION IN AN ARBITRATION PURSUANT TO A GRIEVANCE PROCEDURE IN A LABOR-MANAGEMENT AGREEMENT WILL BE A BAR TO A PROCEEDING AUTHORIZED BY THE FEDERAL TORT CLAIMS ACT?

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GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

The United States Court of Appeals for the Sixth Circuit entered its Opinion on August 17, 1982 affirming the Judgment of the United States District Court for the Eastern District of Michigan, granting Summary Judgment to the United States of America.[1] Petitioner sought Rehearing and Rehearing En Banc which was denied on September 22, 1982.

The statute which confers Jurisdiction on this Court is 28 U.S.C. 1254 (1).

THE STATUTES WHICH ARE INVOLVED IN THIS CASE

28 USC §2674

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to Judgment or to punitive damages."

* * *

28 USC §2680

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

* * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights: *Provided,* That with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this Chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery,

[1] This case is reported below at 686 F2d 410.

false imprisonment, false arrest, abuse of process or malicious prosecution. For purposes of this subsection "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or make arrests for violation of Federal law."

CONCISE STATEMENT OF THE CASE

Petitioner was employed by the Postal Service as a collector of mail. He was accused of stealing from the mail and discharged from employment. He was also charged criminally by a grand jury indictment of stealing from the mail.

Petitioner, pursuant to a collective bargaining agreement between the United States Postal Service and the National Association of Letter Carriers, filed a grievance regarding his discharge. This ultimately brought the matter to arbitration. The arbitrator, after hearing, held that the discharge of Petitioner had been for just cause because the arbitrator found that Petitioner had stolen from the mail.

After the arbitration proceeding and decision, Petitioner went to trial on the criminal charge of stealing from the mail and was acquitted by a jury verdict.

Petitioner then brought the instant action in the United States District Court for the Eastern District of Michigan for malicious prosecution under the Tort Claims Act, 28 USC §2671 et seq. The United States of America moved for Summary Judgment, claiming the case was barred; the decision in the grievance procedure arbitration favorable to the Postal Service causing a collateral estoppel. The District Court accepted this position and granted the United States of America a Summary Judgment.

Petitioner timely filed a Claim of Appeal to the United States Court of Appeals for the Sixth Circuit.

The United States Court of Appeals for the Sixth Circuit, by opinion filed August 17, 1982, affirmed the decision of the District Court. Petitioner timely sought rehearing and rehearing en banc. Rehearing and rehearing en banc were denied on September 22, 1982.

ARGUMENT

THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED THIS CASE CONTRARY TO EXPRESS HOLDINGS OF THIS COURT AND COURTS OF APPEAL, INCLUDING THE COURT OF APPEALS FOR THE SIXTH CIRCUIT, THAT A RIGHT TO PROCEED IN FEDERAL COURT UPON A RIGHT CREATED BY CONGRESS IS NOT DEFEATED BY A DECISION IN A CONTRACT FOUNDED ARBITRATION THAT IS ADVERSE TO THE FEDERAL COURT CLAIMANT.

This Court, in *Alexander* v *Gardner-Denver Co.*, 417 US 36 (1974) held that the federal courts were not bound by a labor-management agreement arbitration decision in an employment discrimination claim. There were two bases for this decision. The first basis was that the rights were distinctly separate, the arbitration being contractual and the discrimination claim being statutory. The second basis was the reasoning that arbitration was not an appropriate forum to determine a discrimination claim.

This Court, in *Barrentine* v *Arkansas-Best Freight Systems*, 450 US 728 (1981), used the decision in *Gardner-Denver* as a basis for holding that a labor-management agreement arbitration decision would not bind federal courts when the rights sought to be enforced were created by the Fair Labor Standards Act, in particular relying upon the reasoning that the rights to contest were separate and distinct, arbitration being contractual and the Fair Labor Standard Act being statutory, *Barrentine*, supra, at pp 745-746.

These two cases have conclusively established that if rights to proceed in federal courts are created by statute a federal court cannot be bound by an arbitration determination.

The several courts of appeal have followed the rule that separate statutory rights may be litigated in federal courts, even though a necessary issue was decided by a contract arbitration because the rights to arbitration and to proceed in federal courts are separate and distinct. The following cases are illustrative, but not necessarily exhaustive, of this proposition.

The Tenth Circuit held that rights created by a state statute were not barred of litigation in federal court by a contractual arbitration decision, *Peabody Galion* v *Dollar*, 666 F2d 1309 (1981).

The Ninth Circuit has held that an arbitration decision would not bar a right to pursue an unfair labor practice claim, *Stephenson* v *N.L.R.B.*, 550 F2d 535 (1977).

The Seventh Circuit has held that arbitration decisions do not bar federal court resolution of claims brought under the Occupational Safety and Health Act, *Marshall* v *N.L. Industries*, 618 F2d 1220 (1980), nor do they bar suits to enforce orders of the Interstate Commerce Commission, *Carothers* v *Western Transportation Co.*, 554 F2d 799 (1972).

The Third Circuit has held that an arbitration decision would not bar prosecution of a claim based upon rights created by the Federal Mine Safety and Health Act, *Consolidated Coal Co.* v *Marshall*, 663 F2d 1211 (1981).

The District of Columbia Circuit has held that an arbitration decision would not bar a right of action created by the Employment Retirement Income Security Act, *Airline Pilots Ass'n* v *Northwest Airlines*, 627 F2d 272 (1981), nor would a collective bargaining arbitration decision bar a claim authorized by the Mine Safety Act, *Philips* v *Interior Board of Mine Operations Appeals*, 500 F2d 772 (1974).

Although, here, petitioner is pursuing a statutory right in federal court that has had a collective bargaining arbitration decision on a necessary issue made contrary to his contentions, and the Sixth Circuit Court of Appeals has, four times, recognized that in such situations an arbitration decision is not a federal court bar, *Thornton* v *East Texas Motor Freight*, 497 F2d 416 (1974); *Guy* v *Robins and Meyers*, 525 F2d 124 (1975); *Columbus Education Ass'n* v *Columbus City School District* 623 F2d 1155 (1980) and *Becton* v *Detroit Terminal of Consolidated Freightways* 687 F2d 140 (1982), the Sixth Circuit, none the less, affirmed a summary judgment defeat of petitioner's claim on the basis that the arbitration decision collaterally estopped the claim.

The *Becton* case, supra, was decided by a different panel of the Sixth Circuit Court of Appeals on August 24, 1982, seven days after the decision in this case, but its publication, generally, was not made until after Petitioner's counsel, here, had prepared and presented the Petition for Rehearing. We, thus, have the anomalous situation of having the panel of the Sixth Circuit Court of Appeals, in the case at bar, relying upon a District Court decision as reason for its decision and another panel, one week later, reversing the relied upon District Court decision on the very point upon which reliance was made.

The decision of the Sixth Circuit Court of Appeals in the case at bar is plainly contrary to decisions of this Court, particularly *Gardner-Denver* and *Barrentine*, supra, numerous decisions of other Courts of Appeal and four decisions of the Sixth Circuit.

Additionally, the treatment of this Court's recent decision in *Kremer* v *Chemical Const. Corp.*, _____ U.S. _____; 102 SCt 1883 (1982) given in the concurring opinion in this case is curious. The *Kremer* decision, clearly, is an affirmance of the reasoning in *Gardner-Denver* that contract arbitrations do not bar federal court actions on rights created by statute, 102 SCt at p 1895. The concurring opinion sought comparison of *Kremer* with *Bar-*

rentine and *Gardner-Denver*. The decisions in *Gardner-Denver, Barrentine* and *Kremer* are all consistent and supportive of Petitioner's contentions and contrary to Court of Appeals decision. Their reasoning does not support the distinction made by the concurring opinion that the Federal Tort Claims Act did not create any rights. Patently, Petitioner brings this case because of the proviso added by Public Law 93-253 to subsection (h) of 28 USC §2680. Prior to the effective date of this enactment there was no right to make a claim for a malicious prosecution committed by a federal "investigative or law enforcement officer". After the effective date there was such a right because Congress had created it.

The cases relied upon by the Sixth Circuit Court of Appeals are not appropriate to its decision.

Montana v *United States*, 440 US 147 (1979) and *Federated Department Stores* v *Mortie*, 452 US 394 (1981) did not involve prior arbitration decisions; rather, they dealt with prior court decisions.

United States v *Utah Construction and Mining Co.*, 384 U.S. 394 (1966) held that where the parties agreed that arbitration would be fully determinative and Congress, in the Wunderlich Act, directed that arbitration would be determinative, arbitration would be determinative. Here, there was no agreement that the arbitration decision be determinative of Federal Tort Claims actions, but the decision, here, amends both the collective bargaining agreement and the Tort Claims Act by determining the arbitration to be conclusive in all circumstances.

Bower v *Eastern Airlines*, 214 F2d 623 (1954) was a diversity action seeking to enforce rights acquired by a contract which contained arbitration provisions. There were no separately and distinctly created rights, one by contract and another by statute. All rights were created by contract.

While we have primarily contended that the "distinctly separate nature of these contractual and statutory rights"

basis for the decision in *Gardner-Denver*, supra, should be determinative to allow Petitioner's Federal Tort Claims action, the other basis for decision in *Gardner-Denver*, supra, also has applicability. The arbitrator's task, here, was made within a frame work of policy of both the Postal Service and the National Association of Letter Carriers that Postal Service employees be above suspicion. This policy, in the words of the *Gardner-Denver* opinion was "the law of the shop". No such policy should color decisions in suits of malicious prosecution.

Lastly, we believe we should comment upon the Court of Appeals' reference to the evidence offered in the arbitration proceeding and the labeling of Petitioner's contention as a "cock and bull story" and that the arbitration decision established a probable cause that Petitioner cannot negate, 686 F2d at pp 413-414. Whether, here, Petitioner's testimony is a cock and bull story that cannot negate probable cause is a question determined wholly upon the credibility of Petitioner and the federal "investigative and law enforcement officers."

Petitioner's credibility was sufficient to persuade a jury of twelve to a unanimous verdict of acquittal. He stands ready to submit to polygraph examination and to waive any right to bar polygraph evidence; both offers being made without regard to whether the federal "investigative and law enforcement officers" would take similar positions.

Whether the Petitioner's evidence will be a "cock and bull story" and whether the "investigative and law enforcement officers" had probable cause to prosecute plaintiff is dependent upon who, from this group of persons, is telling the truth. The law, as evidenced by this Court's decisions in *Gardner-Denver, Barrentine* and *Kremer*, supra, directs that a factual resolution be made in federal court and there is nothing inherent in Petitioner's situation that says that a factual determination favorable to him is beyond comprehension.

CONCLUSION

The Court of Appeals of the Sixth Circuit has approved an entry of a summary judgment of dismissal in a case based upon rights granted by Congress in the Federal Tort Claims Act because of a prior decision in an arbitration pursuant to a labor-management agreement. This decision is in direct conflict with three decisions of this Court, *Alexander* v *Gardner-Denver*, supra, *Barrentine* v *Arkansas-Best Freight Systems*, supra and *Kremer* v *Chemical Const. Corp.*, supra, many decisions of other Courts of Appeal and four decisions of the Court of Appeals for the Sixth Circuit, one of which was entered but one week after decision in that Court in this case.

Because this case stands alone and contrary to recent decisions of this Court which have established the appropriate rule of law, there is no need for this Court to give full treatment of this case on a grant of certiorari. Supreme Court Rule 23.1 provides for ordering a summary disposition on the merits. Such treatment is appropriate here, and, we submit it would be fully appropriate to order the decision of the Court of Appeals reversed and to direct the return of the case to the District Court for trial.

WHEREFORE, Petitioner prays that this petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit be granted, or, that upon receipt and review of a brief in opposition to this petition an order of summary disposition on the merits enter reversing the decision of the Court of Appeals and remanding this case to the District Court for trial.

Respectfully submitted,
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